

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JUAN ORTEGA MORALES, III,  
Petitioner,  
v.  
M. McVAY, et al.,  
Respondents.

No. 2:24-cv-1647 KJM CSK P

FINDINGS AND RECOMMENDATIONS

**I. INTRODUCTION**

Petitioner is a state prisoner, proceeding without counsel, with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the following reasons, this Court recommends that petitioner's motion to stay (ECF No. 7) be denied and that this action be dismissed because petitioner failed to exhaust state court remedies as to all claims.

**II. BACKGROUND**

Petitioner challenges his 2018 conviction from the Butte County Superior Court for second degree murder in violation of California Penal Code § 187(a) to which petitioner pled no contest. (ECF No. 1 at 1.) Petitioner is serving a sentence of 15 years to life. (Id.) The petition raises one claim, which identifies three legal claims: ineffective assistance of counsel, violation of due process and violation of "Brady," which appears to refer to Brady v. United States, 397 U.S. 742, 748 (1970) (a guilty plea must be knowing, intelligent and voluntary). (Id. at 5.) In support

1 of claim one, petitioner argues that counsel was ineffective for urging petitioner to plead no  
 2 contest to murder because the evidence did not support a murder conviction. (Id.) Petitioner  
 3 argues that involuntary manslaughter was a common conviction when the victim was  
 4 unintentionally killed as a consequence of an aggravated assault. (Id.) Petitioner argues that he  
 5 was 17 years old at the time of the incident and easily manipulated by counsel during the court  
 6 proceedings. (Id.) Petitioner argues that counsel could have argued that the victim died over  
 7 forty days after the incident, and that other factors could have caused the victim to die including  
 8 medical negligence, COVID-19, the victim's age and pre-existing medical conditions at the time  
 9 of the incident. (Id. at 17.) Petitioner argues that there was insufficient evidence of malice  
 10 aforethought. (Id. at 19.) Petitioner argues that neither malice aforethought nor premeditation  
 11 played a role in his case. (Id.) Petitioner argues that when a minor is solicited for sex by an  
 12 adult, per the California "Castle doctrine," use of force was warranted because the solicitor did  
 13 not withdraw and appeared capable of injuring petitioner. (Id.) Petitioner argues that had he  
 14 gone to trial, it is reasonably likely that a jury would have acquitted petitioner of murder and  
 15 found him guilty of manslaughter. (Id. at 20.) Petitioner argues that the court did not consider  
 16 the youth offender factors in California Penal Code sections 4801 and 3051.<sup>1</sup> (Id.) Petitioner  
 17 argues that his plea violated Boykin v. Alabama, 395 U.S. 238 (1969) in that it was not knowing,  
 18 intelligent and voluntary.<sup>2</sup> (Id. at 21.)

### 19 III. DISCUSSION RE: EXHAUSTION

#### 20 A. Legal Standard for Exhaustion of State Court Remedies

21 Under 28 U.S.C. § 2254(b), the exhaustion of available state remedies is required before  
 22 claims can be granted by the federal court in a habeas corpus case. See Rose v. Lundy, 455 U.S.  
 23 509, 515-16 (1982). The exhaustion doctrine is based on a policy of federal and state comity,

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 25 <sup>1</sup> In 2013, the California Legislature enacted a parole eligibility mechanism for juvenile  
 offenders. See People v. Franklin, 63 Cal. 4th 261, 276-77 (2016). California Penal Code  
 26 sections 3051 and 4801(c) were enacted in support of the new juvenile offender parole provisions.  
 See Cornego v. Lizzaraga, 2021 WL 616885, at \*20-21 (E.D. Cal. Feb. 17, 2021), findings and  
 27 recommendations adopted 2021 WL 4478727 (E.D. Cal. Sep. 30, 2021).

28 <sup>2</sup> Under Boykin, "the record must affirmatively disclose that a defendant who pleaded guilty  
 entered his plea understandingly and voluntarily." Brady, 397 U.S. at 747 n. 4.

1 designed to give state courts the initial opportunity to correct alleged constitutional deprivations.  
 2 See Picard v. Connor, 404 U.S. 270, 275 (1971); see also Rose, 455 U.S. at 518. “A petitioner  
 3 may satisfy the exhaustion requirement in two ways: (1) by providing the highest state court with  
 4 an opportunity to rule on the merits of the claim ...; or (2) by showing that at the time the  
 5 petitioner files the habeas petition in federal court no state remedies are still available to the  
 6 petitioner and the petitioner had not deliberately by-passed the state remedies.” Batchelor v.  
 7 Cupp, 693 F.2d 859, 862 (9th Cir. 1982) (citations omitted).

8 Regardless of whether the claim was raised on direct appeal or in a post-conviction  
 9 proceeding, the exhaustion doctrine requires that each claim be fairly presented to the state’s  
 10 highest court. See Castille v. Peoples, 489 U.S. 346, 351 (1989). A claim has been fairly  
 11 presented if the petition has described both the operative facts and the federal legal theory on  
 12 which the claim is based. See Duncan v. Henry, 513 U.S. 364, 365-66 (1995). Although the  
 13 exhaustion doctrine requires only the presentation of each federal claim to the highest state court,  
 14 the claims must be presented in a posture that is acceptable under state procedural rules. See  
 15 Sweet v. Cupp, 640 F.2d 233, 237 (9th Cir. 1981). Thus, an appeal or petition for post-conviction  
 16 relief that is denied by the state courts on procedural grounds, where other state remedies are still  
 17 available, does not exhaust the petitioner’s state remedies. See Pitchess v. Davis, 421 U.S. 482,  
 18 488 (1979); Sweet, 640 F.2d at 237-38.

19       **B. Petitioner’s Appeals**

20           1. Background

21 Petitioner claims that he appealed his conviction, although he does not attach any  
 22 documents from his state appeal. (ECF No. 1 at 2.) Records from the California Court of Appeal  
 23 reflect that petitioner filed two appeals following his conviction.<sup>3</sup> In case no. C090360, petitioner  
 24 filed a notice of appeal on September 12, 2019. The notes in the docket reflect that petitioner was  
 25 appealing the trial court’s denial of petitioner’s request for sentence modification on restitution of

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26       <sup>3</sup> This Court takes judicial notice of the docket from the California Court of Appeal containing  
 27 the records of petitioner’s appeals. See Fed. R. Evid. 201; Reyn’s Pasta Bella, LLC v. Visa USA,  
 28 Inc. 442 F.3d 741, 746 n.6 (9th Cir. 2006) (court may take judicial notice of matters of public  
 record not subject to reasonable dispute).

1 fines and fees. On October 24, 2019, counsel was appointed to represent petitioner in this appeal.  
2 After receiving briefing from both petitioner's counsel and respondent, the California Court of  
3 Appeal denied this appeal on June 12, 2020 as an appeal from a nonappealable order, citing  
4 People v. Turrin, 176 Cal. App. 4th 1200, 1206-07 (2009). The docket from the California Court  
5 of Appeal reflects that on July 23, 2020, petitioner filed a petition for review in the California  
6 Supreme Court regarding the denial of appeal no. C090360 by the California Court of Appeal.  
7 On August 26, 2020, the California Supreme Court denied the petition for review.

8 Records from the California Court of Appeal reflect that in case no. C090858, petitioner  
9 filed an appeal on November 7, 2019. On January 28, 2020, counsel was appointed to represent  
10 petitioner in this appeal. On September 4, 2020, appellate counsel filed a brief pursuant to People  
11 v. Wende, 25 Cal. 3d 436 (1979).<sup>4</sup> On February 16, 2021, the California Court of Appeal  
12 dismissed petitioner's appeal as abandoned, citing People v. Figueras, 61 Cal. App. 5th 108  
13 (2021) (describing the Wende procedures applicable to postconviction petitions), vacated and  
14 remanded, 308 Cal. Rptr. 3d 642 (May 31, 2023), and People v. Serrano, 211 Cal. App. 4th 496,  
15 501-04 (2012) (dismissing appeal as abandoned where appellant identified no arguable issues and  
16 sought Wende review). The docket from the California Court of Appeal does not reflect that  
17 petitioner appealed this decision to the California Supreme Court.

18       2. Analysis

19 This Court finds that petitioner's two state court appeals did not exhaust any of the claims  
20 raised in the instant petition. As discussed above, in appeal no. C090360, petitioner appealed the  
21 denial of his request for sentence modification on restitution of fines and fees. The instant  
22 petition raises no claims regarding sentence modification on restitution of fines and fees. Appeal  
23 no. C090858 did not exhaust any claims because petitioner did not file a petition for review in the  
24 California Supreme Court following the California Court of Appeal's dismissal of this appeal.

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27       <sup>4</sup> In People v. Wende, the California Supreme Court established a constitutionally sufficient  
28 procedure by which appellate counsel may inform the court of the nature of an appeal and decline  
to brief issues judged to be frivolous. See Smith v. Robbins, 528 U.S. 259, 265 (2000).

1           **C. Petitioner's Habeas Corpus Petition Filed in the California Supreme Court**

2           1. Background

3           Attached to the instant petition is a copy of a habeas corpus petition addressed to the  
4           California Supreme Court and signed by petitioner on April 3, 2023. (ECF No. 1 at 46-51.) This  
5           petition does not contain a date filed stamp. Records from the California Supreme Court reflect  
6           that petitioner filed a habeas corpus petition in the California Supreme Court in case no. S279510  
7           on April 14, 2023.<sup>5</sup> Attached to the instant petition is a copy of the July 12, 2023 order by the  
8           California Supreme Court denying the habeas corpus petition filed in case no. S279510. (*Id.* at  
9           44.) Based on these records, this Court finds the copy of the habeas corpus petition addressed to  
10          the California Supreme Court attached to the instant petition is the habeas corpus petition  
11          petitioner filed in the California Supreme Court in case no. S279510.

12          Petitioner's habeas corpus petition filed in the California Supreme Court contained two  
13          claims for relief. In claim one, petitioner described his grounds for relief as California Penal  
14          Code § 1170.95 and ineffective assistance of counsel.<sup>6</sup> (*Id.* at 48.) Petitioner argued that his  
15          counsel was ineffective for advising petitioner to plead no contest to second degree murder  
16          because evidence existed supporting a manslaughter conviction. (*Id.*) Petitioner argued that a  
17          manslaughter conviction was a common verdict when the victim was unintentionally killed as a  
18          consequence of an aggravated assault. (*Id.*) Petitioner argued that the victim died over forty days  
19          after the incident and that other factors could have caused the victim's death including medical  
20          negligence, COVID-19, the victim's age and pre-existing conditions. (*Id.*) Petitioner argued that  
21          he was 17 years old at the time of the incident. (*Id.*) In claim two, petitioner described his

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23          <sup>5</sup> This Court takes judicial notice of the California Supreme Court's docket reflecting  
24          petitioner's habeas corpus petition, case no. S279510. See Fed. R. Evid. 201; Reyn's Pasta Bella,  
25          442 F.3d at 746 n.6.

26          <sup>6</sup> Effective January 1, 2019, the California legislature restricted the circumstances under which a  
27          participant in an underlying offense may be found guilty of murder on a felony-murder or a  
28          natural-and-probable-consequences theory, and added a new statutory provision, California Penal  
Code section 1170.5, "which provides a procedure by which those convicted of murder can seek  
retroactive relief if the change in law would affect their previously sustained convictions."  
People v. Martinez, 31 Cal. App. 5th 719, 722-23 (2019). Effective June 30, 2022, California  
Penal Code section 1170.95 was renumbered and can now be found at California Penal Code  
section 1172.6.

1 grounds for relief as California Penal Code sections 1016 and 1018.<sup>7</sup> (*Id.* at 49.) In support of  
 2 claim two, petitioner claimed that he entered his guilty plea because he was told by counsel that  
 3 he did not have any defense to the crime charged and that petitioner was under the age of 18 at  
 4 the time. (*Id.*)

5       In the instant petition, various exhibits follow the copy of petitioner's habeas corpus  
 6 petition filed in the California Supreme Court: petitioner's abstract of judgment, felony  
 7 complaint, the probation officer's report, the record from petitioner's plea agreement and an order  
 8 by the Butte County Superior Court setting petitioner's motion for a Franklin Hearing on the  
 9 court calendar. (*Id.* at 50-62.) It is unclear whether petitioner attached these documents to the  
 10 habeas corpus petition filed in the California Supreme Court.

11       On July 12, 2023, the California Supreme Court denied petitioner's habeas corpus  
 12 petition, case no. S278510, by order citing People v. Duvall, 9 Cal. 4th 464, 474 (1995) (a  
 13 petition for writ of habeas corpus must include copies of reasonably available documentary  
 14 evidence) and In re Swain, 34 Cal. 2d 300, 304 (1949) (a petition for writ of habeas corpus must  
 15 allege sufficient facts with particularity). (*Id.* at 44.)

16           2. Analysis

17           a. *Claim Pursuant to California Penal Code Sections 4801 and 3051*

18       In the instant petition, petitioner appears to claim that the trial court did not consider the  
 19 youth offender factors in California Penal Code sections 4801 and 3051. Petitioner's habeas  
 20 corpus petition filed in the California Supreme Court did not raise a claim based on the trial  
 21 court's failure to consider the youth offender factors in California Penal Code sections 4801 and  
 22 3051. Accordingly, this claim is not exhausted.

23           b. *Claims Based on Alleged Ineffective Assistance of Counsel*

24       In the instant petition, petitioner argues that his counsel was ineffective for advising  
 25 petitioner to plead no contest to second degree murder for the following reasons: 1) the evidence

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26      <sup>7</sup> California Penal Code section 1016 lists the six kinds of pleas to an indictment or an  
 27 information, or to a complaint charging a misdemeanor or infraction. California Penal Code  
 28 section 1018 allows "a defendant to withdraw his or her guilty or no contest plea...for good cause  
 shown by clear and convincing evidence." People v. Archer, 230 Cal. App.4th 693, 702 (2014).

1 supported involuntary manslaughter because there was insufficient evidence of malice  
2 aforethought because the victim was unintentionally killed as a consequence of an aggravated  
3 assault; 2) counsel could have argued that other factors could have caused the victim to die such  
4 as medical negligence, COVID-19, the victim's age, and pre-existing medical conditions; and  
5 3) counsel could have argued that, per the California "Castle doctrine," use of force was  
6 warranted because the solicitor did not withdraw and appeared capable of injuring petitioner.

7 Petitioner's ineffective assistance of counsel claim based on counsel's failure to argue the  
8 "Castle doctrine" is not exhausted because petitioner did not raise this claim in the habeas corpus  
9 petition filed in the California Supreme Court. See Gulbrandson v. Ryan, 738 F.3d 976, 992 (9th  
10 Cir. 2013) ("As a general matter, each unrelated alleged instance of counsel's ineffectiveness is a  
11 separate claim for purposes of exhaustion.") (internal citations omitted); Hemmerle v. Schriro,  
12 495 F.3d 1069, 1075 (9th Cir. 2007) ("all operative facts to an ineffective assistance claim must  
13 be presented to the state courts in order for a petitioner to exhaust his remedies.").

14 This Court next considers the California Supreme Court's citation to People v. Duvall and  
15 In re Swain as to the ineffective assistance of counsel claims raised in both the instant petition and  
16 the habeas corpus petition filed in the California Supreme Court: counsel was ineffective for  
17 advising petitioner to plead guilty to second degree murder because 1) the evidence supported a  
18 manslaughter conviction because the victim was unintentionally killed as a consequence of  
19 assault; and 2) the victim died over forty days after the incident and other factors could have  
20 caused the victim's death including medical negligence, COVID-19, the victim's age and pre-  
21 existing conditions.

22 As discussed above, the California Supreme Court denied petitioner's habeas corpus  
23 petition by order citing People v. Duvall, 9 Cal. 4th 464, 474 (1995), based on petitioner's failure  
24 to include copies of reasonably available documentary evidence, and In re Swain, 34 Cal. 2d 300,  
25 304 (1949), based on petitioner's failure to allege sufficient facts with particularity. When the  
26 California Supreme Court denies a petition for writ of habeas corpus with citations to both Duvall  
27 and Swain, the decision is "in effect, the grant of a demurrer, i.e., a holding that [the petitioner]  
28 ha[s] not pled facts with sufficient particularity." Curiel v. Miller, 830 F.3d 864, 869 (9th Cir.

1 2016) (alterations in original) (elaborating on the meaning of the Duvall and Swain citations in  
2 California Supreme Court orders). “These are defects that can be cured in a renewed state  
3 petition[, and] [s]tate judicial remedies are not exhausted in such a case.” McCarthy v.  
4 Frauenheim, 2017 WL 5972696, at \*3 (N.D. Cal. Dec. 1, 2017); see Kim v. Villalobos, 799 F.2d  
5 1317, 1319 (9th Cir. 1986) (“Swain is cited by the California Supreme Court to indicate that  
6 claims have not been alleged with sufficient particularity. That deficiency, when it exists, can be  
7 cured in a renewed petition.”).

8 The California Supreme Court’s citations to Duvall and Swain do not establish per se that  
9 petitioner failed to exhaust his current claims. See Kim, 799 F.2d at 1319. Rather, this Court is  
10 required to “independently analyze the petition presented to the California Supreme Court to  
11 determine whether [the petitioner] satisfied federal exhaustion requirements and alleged his  
12 claims ‘with as much particularity as is practicable.’” Barrera v. Att’y Gen. of California, 473  
13 F.App’x. 748, 749 (9th Cir. 2012) (internal citations omitted) (citations to Swain and Duvall  
14 require a federal habeas court to independently analyze the state petition to determine whether the  
15 petitioner satisfied federal exhaustion requirements and alleged his claims with as much  
16 particularity as is practicable).

17 For the following reasons, this Court finds that the California Supreme Court’s citation to  
18 Duvall and Swain establish that petitioner failed to exhaust the two ineffective assistance of  
19 counsel claims raised in both the instant petition and the petition filed in the California Supreme  
20 Court. In the petition filed in the California Supreme Court, petitioner pled no specific facts  
21 supporting his claim that counsel was ineffective in advising petitioner to plead no contest to  
22 second degree murder because the evidence supported a manslaughter conviction as the victim  
23 was unintentionally killed as a consequence of an aggravated assault. In addition, petitioner pled  
24 no specific facts supporting his claim alleging that counsel was ineffective in advising petitioner  
25 to plead no contest to second degree murder because the victim’s death could have been caused  
26 by other factors such as medical negligence, COVID-19, the victim’s age and pre-existing  
27 conditions. Both claims, as pled in the petition filed in the California Supreme Court, were vague  
28 and conclusory. Petitioner also failed to attach any documentary evidence supporting either of

1 these claims to the petition filed in the California Supreme Court. The documents attached to the  
2 instant petition, which may have been attached to the habeas corpus petition filed in the  
3 California Supreme Court, i.e., petitioner's abstract of judgment, felony complaint, the probation  
4 officer's report, the record from petitioner's plea agreement and order by the Butte County  
5 Superior Court setting petitioner's motion for a Franklin Hearing on the court calendar, do not  
6 appear to support the ineffective assistance of counsel claims raised in both the instant petition  
7 and the habeas corpus petition filed in the California Supreme Court. Accordingly, for these  
8 reasons, this Court finds that the two ineffective assistance of counsel claims raised in both the  
9 instant petition and the California Supreme Court are not exhausted because petitioner could  
10 renew his petition in the California Supreme Court raising these claims with additional facts  
11 and/or documentation supporting these claims.

12                   *c. Claim Alleging Involuntary Plea*

13                 In the instant petition, based on the citations to Brady and Boykin, petitioner appears to  
14 raise claims challenging the voluntariness of his plea based on the alleged ineffective assistance  
15 of counsel discussed above and, possibly, on the grounds that he did not understand the  
16 consequences of his plea as he was under the age of 18 at the time he pled no contest. In the  
17 habeas corpus petition filed in the California Supreme Court, petitioner did not clearly raise a  
18 claim alleging violation of his federal constitutional rights based on the involuntariness of his plea  
19 on these grounds. However, in claim one of the habeas corpus petition filed in the California  
20 Supreme Court, in the section titled "Supporting cases, rules, or other authority," petitioner wrote,  
21 "Petitioner[']s rights to due process of law under the Fifth, Sixth and Fourteenth Amendments  
22 were violated by permitting appellant to be convicted of one count of second degree murder on  
23 the basis of a misleading negotiated plea." (ECF No. 1 at 48.) To the extent this language could  
24 be construed as raising an involuntary plea claim based on ineffective assistance of counsel, this  
25 Court finds that the California Supreme Court's citation to Duvall and Swain establish that  
26 petitioner failed to exhaust this claim. As discussed above, petitioner's ineffective assistance of  
27 counsel claims raised in the California Supreme Court, on which the involuntary plea claim  
28 appears to be based, were not exhausted because they were vaguely pled and not supported by

1 any documentation. Accordingly, petitioner's claim challenging the voluntariness of his plea  
2 based on ineffective assistance of counsel is not exhausted because petitioner could renew his  
3 petition in the California Supreme Court raising this claim with additional facts and/or  
4 documentation supporting this claim.

5 This Court also finds that the citations to Duvall and Swain are also applicable to  
6 petitioner's claim challenging the voluntariness of his plea based on his age at the time of his plea  
7 as this claim, as pled in the habeas corpus petition filed in the California Supreme Court, was  
8 vague and not supported by any documentation. Petitioner could renew his petition in the  
9 California Supreme Court raising this claim with additional facts and/or documentation  
10 supporting this claim.

11 As discussed above, claim two of the habeas corpus petition raised in the California  
12 Supreme Court did not challenge the voluntariness of petitioner's plea based on alleged violations  
13 of petitioner's federal constitutional rights. Instead, claim two of the petition raised in the  
14 California Supreme Court challenged petitioner's plea based on alleged violations of California  
15 Penal Code sections 1016 and 1018. For this reason, claim two of the habeas corpus petition filed  
16 in the California Supreme Court did not exhaust petitioner's claims raised in the instant petition  
17 challenging the voluntariness of his plea.

18 For the reasons discussed above, this Court finds that petitioner's claims challenging the  
19 voluntariness of his plea are not exhausted.

#### 20 **IV. PETITIONER'S MOTION TO STAY**

21 As discussed above, petitioner failed to exhaust all of the claims raised in the instant  
22 petition. In "limited circumstances," the district court may stay and abey a habeas petition for the  
23 purpose of allowing the petitioner to exhaust state remedies (a "Rhines stay"). See Rhines v.  
24 Weber, 544 U.S. 269, 277 (2005). A Rhines stay may be employed as to both "mixed"  
25 petitions—i.e., those containing exhausted and unexhausted claims—and petitions raising only  
26 unexhausted claims. See Mena v. Long, 813 F.3d 907, 908 (9th Cir. 2016). A Rhines stay is  
27 appropriate if (1) the petitioner has good cause for his failure to exhaust, (2) his unexhausted  
28 claims are potentially meritorious, and (3) there is no indication that the petitioner engaged in

1 intentionally dilatory litigation tactics. See Rhines, 544 U.S. at 278.

2 On September 9, 2024, this Court found that none of the claims raised in the instant  
 3 petition were exhausted for the reasons discussed above. (ECF No. 6.) In the September 9, 2024  
 4 order, this Court advised petitioner of the legal standards for a Rhines stay.<sup>8</sup> (Id. at 8-9.) This  
 5 Court granted petitioner thirty days to file a motion for a Rhines stay. (Id.)

6 Pending before the Court is petitioner's motion for a Rhines stay. (ECF No. 7.) In this  
 7 motion, petitioner fails to address whether he has good cause for his failure to exhaust his claims,  
 8 whether his unexhausted claims are potentially meritorious, and whether he did not engage in  
 9 intentionally dilatory tactics. (Id.) Based on petitioner's failure to address the Rhines factors, this  
 10 Court recommends that petitioner's motion to stay this action pursuant to Rhines be denied.

## 11 V. CONCLUSION

12 For the reasons discussed above, this Court recommends that this action be dismissed  
 13 because no claims raised in the petition are exhausted.<sup>9</sup>

14 Accordingly, IT IS HEREBY RECOMMENDED that:

- 15 1. Petitioner's motion to stay (ECF No. 7) be denied; and  
 16 2. This action be dismissed based on petitioner's failure to exhaust state court remedies.

17 These findings and recommendations are submitted to the United States District Judge  
 18 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
 19 after being served with these findings and recommendations, petitioner may file written  
 20 objections with the court and serve a copy on all parties. Such a document should be captioned  
 21 "Objections to Magistrate Judge's Findings and Recommendations." If petitioner files objections,

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22 <sup>8</sup> The Court notes that the alternative procedure for staying and abeying a federal habeas petition  
 23 pursuant to Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003), only applies to habeas petitions that  
 24 contain exhausted as well as unexhausted claims for relief. Because the instant petition is wholly  
 unexhausted, a Kelly stay is not available in the present case.

25 <sup>9</sup> Petitioner is cautioned that the habeas corpus statute imposes a one-year statute of limitations  
 26 for filing non-capital habeas corpus petitions in federal court. In most cases, the one-year period  
 27 will start to run on the date on which the state court judgment became final by the conclusion of  
 direct review or the expiration of time for seeking direct review, although the statute of  
 limitations is tolled while a properly filed application for state post-conviction or other collateral  
 review is pending. 28 U.S.C. § 2244(d).

1 he shall also address whether a certificate of appealability should issue and, if so, why and as to  
2 which issues. A certificate of appealability may issue under 28 U.S.C. § 2253 “only if the  
3 applicant has made a substantial showing of the denial of a constitutional right.” 28  
4 U.S.C. § 2253(c)(3). Petitioner is advised that failure to file objections within the specified time  
5 may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th  
6 Cir. 1991).

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8 Dated: May 28, 2025

9   
10 CHI SOO KIM  
11 UNITED STATES MAGISTRATE JUDGE

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